ARAB MALAYSIAN BANK BHD

v.

STRATEGI CERAH SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8-22-3310-1999]
22 MAY 2006

CONTRACT: *Loan - Breach - Plaintiff bank granted 1st defendant a term loan and entered into a loan agreement cum assignment - Whether term loan and agreement frustrated and became void - Whether there was a total failure of consideration - Whether plaintiff had right in personam - Rules of the High Court 1980, O. 14A*

BANKING: *Banks and banking business - Loan - Plaintiff bank granted 1st defendant a term loan and entered into a loan agreement cum assignment - Whether term loan and agreement frustrated and became void - Whether there was a total failure of consideration - Whether plaintiff had right in personam - Rules of the High Court 1980, O. 14A*

The plaintiff had granted the 1st defendant a term loan of RM480,000 for the purchase of two condominium units ('the units'). Both parties also entered into a loan agreement cum assignment on 11 March 1997 ('the agreement') where the 1st defendant's full benefit of two sale and purchase agreements pertaining to the units were assigned to the plaintiff. A Power of Attorney was executed to enable the plaintiff to subsequently release the units to the 1st defendant; following the agreement, the 2nd and 3rd defendants executed a letter of guarantee dated 11 March 1997. The plaintiff claimed that the defendants had failed to fulfil their obligations under the agreement and guarantee, and claimed the amount of RM340,516.51. The defendants counterclaimed, contending that the sale of the subject matter of the agreement *ie*, condominium unit No. 1-5A ('the unit') to a 3rd party had released them from any obligation whatsoever under the agreement. The plaintiff informed the court that it had filed an originating summons for a declaration that it was the rightful assignee of the unit that had been sold to the 3rd party by the developer, which was, however, dismissed with costs. Since there were no issues of facts, the parties were directed to consider determination of the suit under O. 14A of the Rules of the High Court 1980 ('RHC'). The issues requiring determination were: (i)

whether the agreement and term loan dated 11 March 1997 were frustrated; (ii) whether there was a total failure of consideration where the loan was concerned; and (iii) whether the plaintiff was capable of fulfilling its obligations of delivering back the said units to the 1st defendant under the agreement if the 1st defendant fulfilled its obligations under cl. 50 of the agreement.

Held (dismissing the plaintiff's claim and allowing the defendants' counterclaim):

(1) It was clear that the agreement was frustrated; the fact that the defendants could never get back the units that they had assigned to the plaintiff was the main cause. This state of affairs came about because the developer had sold off the unit to a 3rd party. The fact that the plaintiff's application for a declaration that it was the rightful assignee of the property was dismissed had confirmed the fate of the units. They could never be handed over to the defendants. Even if the defendants had paid up the entire loan disbursed to them, they would never be able to enjoy the units that they had paid for over the years. The plaintiff's argument that the defendants would have to keep making payments to the plaintiff regardless of the fact that they would never obtain the units was somewhat inconceivable. Equally so was the plaintiff's contention that the units were not the consideration for the agreement, but the defendants' agreement to pay. Clause 50 of the agreement provided that the defendants should be entitled to obtain a discharge and release of the said property upon full repayment of the loan to the plaintiff. This showed that the plaintiff's obligation was to release and discharge the property to the defendants after the loan was repaid in full. It was obvious that at the end of the day, the plaintiff would not be able to fulfil that obligation. The effect of all this was that the whole contract was frustrated, as a fundamental term of the contract for the plaintiff to reassign the condominium had become impossible even if the full sum due was paid. Therefore, the agreement and the term loan agreement dated 11 March 1997 were frustrated and became void under s. 57(2) of the Contracts Act 1950. (paras 19, 20 & 21)

(2) On the issue of total failure of consideration, cl. 10 of the agreement provided that in consideration of the term loan and the sum of RM480,000 given by the plaintiff to the 1st defendant, the 1st defendant agreed to assign all rights and

interests in the units to the plaintiff, and the plaintiff agreed to reassign the units to the defendant after the defendant paid in full the term loan. Hence, the plaintiff's contention that the consideration of the agreement was not the physical units but the defendants' agreement to repay the loan was incorrect. The main purpose of the agreement was obviously to finance the purchase of the units by the defendants and the consideration for the agreement was, therefore, the assigned units. Since the assigned units were no longer in the plaintiff's possession because of the sale of the unit to a 3rd party and the court order refusing to declare the plaintiff as lawful assignee of the units, there was clearly a total failure of consideration. The right *in personam* was no longer available to the plaintiff since the plaintiff would not be able to release the units to the defendants and, therefore, had failed to fulfil its obligations under the agreement. (para 22, 23 & 24)

(3) Since the agreement and the term loan was frustrated and there was a total failure of consideration, the plaintiff's claim against the 1st and 2nd defendants was dismissed with costs. As for the 1st defendant's counterclaim, since the 1st defendant had similarly made substantial repayments to the plaintiff, it would not be fair to claim that the plaintiff's right to full repayment remained intact whilst there was no possibility of releasing the units to the defendant. A total of RM69,922.53 was allowed, being RM43,722.53 that the 1st defendant had paid the plaintiff and RM26,000, after deducting RM150,970 with interest at the rate of 8% from 29 September 2004 until full settlement and costs. As for the 3rd defendant, he was entitled to costs since the declaration that he had sought had been decided in this determination under O. 14A of the RHC. (paras 24 & 25)

[Order accordingly.]

Case(s) referred to:

Delta Enterprise Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor [2005] 1 CLJ 501 CA ***(refd)***

Goh Yew Chye & Anor v. Soh Kian Tee [1970] 1 MLJ 138 ***(foll)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1998] 2 CLJ 101 SC ***(refd)***

Hong Leong Leasing Sdn Bhd v. Gan Kim Cheong [1993] 1 LNS 110 ***(refd)***

Kredin Sdn Bhd v. YTF Investments Sdn Bhd [1998] 1 CLJ 205 CA ***(refd)***

A *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1998] 2 MLJ 449* ***(foll)***
Public Finance Berhad v. Ehwan Saring [1996] 1 CLJ 628 HC ***(foll)***

Legislation referred to:
B Contracts Act 1950, ss. 57(2), 66
Rules of the High Court 1980, O. 14A

For the plaintiff - Abdullah Omar; M/s Hisham Sobri & Kadir
For the 1st defendant - K Ramesh (Zachary Ivan Scully with him); M/s Chellam Wong & Co
C *For the 2nd & 3rd defendants - Riza Makhzan; M/s Sharifah & Assoc*

Reported by Suresh Nathan

D

JUDGMENT

Abdul Wahab Said J:

[1] The plaintiff granted to the 1st defendant a term loan of RM480,000 *vide* a letter of offer dated 20 January 1997 for the E purchase of two condominium units in the housing development known as "Gurney Heights" ("the units"). The plaintiff and 1st defendant also entered into a loan agreement cum assignment on 11 March 1997 where the 1st defendant's full entire benefits of two sale and purchase agreements pertaining to the units were F assigned to the plaintiff. A power of attorney was executed to enable the plaintiff to subsequently release the units to the 1st defendant. Following the agreement, the 2nd and 3rd defendants executed a letter of guarantee dated 11 March 1997. The plaintiff claimed that the defendants had failed to fulfill their obligations G under the agreement and guarantee and claimed the amount of RM340,516.51.

[2] On the date fixed for hearing, the 1st and 2nd defendants' solicitors discharged themselves. The defendants duly engaged new H solicitors. A day after the new solicitors took over, they applied to amend the defendants' defence. The amendment was sought because the defendants alleged that there was a total failure of consideration. The subject matter of the agreement, ie, condominium Unit No. 1-5A ("the unit") was sold to a 3rd party. I The defendants claim that the sale of the unit to the 3rd party had released them from any obligation whatsoever under the agreement. The defendant counterclaimed.

[3] The plaintiff's learned counsel informed the court that it had filed an Originating Summons No. S3-24-3280-2002 for a declaration that the plaintiff is the rightful assignee of the unit that had been sold to the 3rd party by the developer, however the originating summons was dismissed with costs.

[4] Having observed that there were no issues of facts, I directed the parties to consider determination of the suit under O. 14A of the Rules of High Court. Parties subsequently agreed and the questions for determination posed by parties to the court are the following:

(i) Whether the assignment agreement and term loan dated 11 March 1997 was frustrated;

(ii) Whether there is total failure of consideration where the loan is concerned.

(iii) Whether the plaintiff is capable of fulfilling its obligations of delivering back the said units to the 1st defendant under the agreement if the 1st defendant fulfilled its obligations under cl. 50 of the agreement.

[5] On the first and second questions, the plaintiff's learned counsel submitted that the fact that the unit had been sold to a 3rd party does not in anyway frustrate the agreement. The agreement was said to have stood by itself and enforceable since the plaintiff is claiming *in personam*, for breach of terms of the agreement by the 2nd and 3rd defendant. He further contended that the agreement is a loan agreement cum assignment and not a charge agreement. The subject matter that has become the consideration in the agreement is not the unit but 1st defendant's agreement to repay the loan including interest that had been agreed to. The plaintiff had fulfilled its contractual obligations by releasing a major portion of the loan for the purpose of purchasing the units.

[6] The learned counsel next referred to cls. 5, 6 and 11 of the agreement and said that the claim is for the defendant's breach in fulfilling its contractual obligations to repay the loan with interest. Clause 14(2) was said to have given the plaintiff the liberty to proceed against the 1st defendant *in personam* without having regard to what has happened to the property. The plaintiff said that the sale of the unit to a 3rd party is a totally separate issue and should not be linked to the suit by the plaintiff to recover the loan repayment from the defendants.

[7] On the 3rd question of whether the plaintiff is capable of fulfilling its obligations of delivering back the said units to the 1st defendant under the agreement if the 1st defendant fulfilled its obligations under cl. 50 of the agreement, the plaintiff contended that it is misconceived, hypothetical and a mere speculation. This is because the defendants are far from having fulfilled their obligations under cl. 5 and cl. 6(a) and (b) of the agreement. It follows that the plaintiff is similarly not obliged at this stage to return the units to the defendants. The plaintiff's learned counsel reiterated that the agreement involves an assignment of rights and interests and does not involve the physical delivery of the units to the plaintiff by the defendants. He referred to the case of *Kredin Sdn Bhd v. YTF Investments Sdn Bhd* [1998] 1 CLJ 205 to prove this point.

[8] The plaintiff's learned counsel added that as the agreement is a loan agreement cum assignment, the rights that exist on the units is purely as a security because no individual strata title had been issued. Under the agreement, the 1st defendant as purchaser assigns to the plaintiff all his rights to the property as security for repayment of the loan in consideration of the plaintiff releasing the loan. He further said that only if the there had been an actual charge on the titles to the units before the plaintiff releases the loan in consideration of the 1st defendant charging the units to the plaintiff, then perhaps plaintiff under obligation to return the charged property situation would arise. The plaintiff stressed that in bringing this action, it is merely exercising its contractual rights to obtain the contractual remedies under the agreement.

[9] Lastly, despite the fact that the plaintiff's originating summons for a declaration that it is the legitimate assignee was dismissed with costs, 1st defendant is still contractually obliged to repay the loan and it does not exonerate the defendants from their contractual obligations. The plaintiff had released a substantial portion of the loan in financing the purchase of the units and the agreement was agreed to and signed by all the parties. The agreement is still valid, subsisting and enforceable against the 1st defendant. The dismissal of the originating summons was based on technical grounds, ie, the plaintiff's failure to name some other parties in the application and had not been decided on its merits. The plaintiff could still file afresh, and name the necessary parties.

[10] The plaintiff's learned counsel referred to *Delta Enterprise Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor* [2005] 1 CLJ 501 where the court held that the obligation to pay monthly interest is mandatory and failure to pay interest is a breach under the loan agreement allowing the plaintiff to exercise its rights under section 6.01 as an event of default under the agreement. In *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41, the Supreme Court upheld the High Court's decision that with the existence of the assignment agreement the conflicting parties are bound by their contractual obligations and the reliefs that the plaintiff had asked for were allowed.

[11] In their submission in reply, the defendants' learned counsel referred to cl. 50 of the agreement that reads:

> **50. Release**
>
> ... Upon repayment to the Bank of the loan together with all interest thereon and all other whatsoever monies payable by the Borrower under this Agreement, the Borrower shall be entitled at the Borrower's own cost and expense ... To obtain discharge and release of the said property from the bank ...

[12] The defendants' learned counsel contended that the plaintiff is obliged to release the units after the 1st defendant has paid all the loan and interest in full. However, there is now a situation where the plaintiff would not be able to release the units to the 1st defendant. The plaintiff would not anymore be in a position to fulfill its obligations under cl. 50 of the agreement even if the 1st defendant had repaid the term loan in full.

[13] Therefore, the 1st defendant's learned counsel submitted, since the plaintiff would not be in position to release the units to the 1st defendant, the doctrine of frustration applies. Accordingly, the agreement becomes void under s. 57(2) of the Contracts Act 1956.

[14] The 1st defendant claims that it has paid a total of RM220,892.53 for the purchase of the units. The amount consist of RM177,170 paid to the original developer of the project, Modular Resources Sdn Bhd. The 1st defendant said that it should be entitled to RM220,892.53, since the plaintiff would not be able to hand over the units to the 1st defendant. He referred to *Public Finance Berhad v. Ehwan bin Saring* [1996] 1 CLJ 628

where it was held that if an agreement becomes void, as in this case, the plaintiff is obliged to return monies paid under s. 66 of the Contracts Act.

[15] On the issue of whether there is a total failure of consideration, the 1st defendant referred to cl. 10 of the agreement. It says that in consideration of the term loan of RM480,000 given by the plaintiff to the 1st defendant, the 1st defendant agrees to assign all its rights and interests in the units to the defendant after the defendant pays in full the term loan. However, since the units that the plaintiff had assigned is no longer in the plaintiff's possession because of the court order in S3-24-3280-2002 and the sale of unit 1-5A to a 3rd party, the consideration for the agreement had failed. He referred to *Goh Yew Chye & Anor v. Soh Kian Tee* [1970] 1 MLJ 138 on total failure of consideration. To support his argument that the 1st defendant is entitled to repayment of the sum already paid to the plaintiff, he also referred to the case of *Hong Leong Leasing Sdn Bhd v. Gan Kim Cheong* [1993] 1 LNS 110.

[16] On the plaintiff's claim that in suing the defendants, it is exercising its right *in personam*, the 1st defendant's learned counsel referred to the case of *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1998] 2 MLJ 449, where it was held that the plaintiff could only exercise its right *in personam* if it has fulfilled its obligations under the agreement. However, since the plaintiff would not be able to deliver the units back to the 1st defendant, the right *in personam* is no longer available to the plaintiff.

[17] The 1st defendant's learned counsel disagreed with the plaintiff's that the subject matter of the agreement is not the physical units but the defendant's agreement to repay the loan. He submitted that the main purpose of the agreement is to enable the 1st defendant to finance the purchase of the units by the plaintiff. Therefore, the purchase of the units is not severable from the agreement. In amplification of his point he again referred to cl. 10 of the agreement. It says that: "In consideration of the bank having agreed to grant to the borrower the term loan, the borrower as beneficial owner hereby assigns unto the bank absolutely all his rights, title and interest in and to the said property and the full and entire benefit of the sale agreement

together with all the rights, title and interest of the borrower therein ..." He therefore concluded that the subject matter that has become the consideration for the agreement is the said units.

[18] Having heard these submissions I answered all the three questions in the positive. I dismissed the plaintiff's claim and allowed the counterclaim both with costs to the defendants. I decided as such for the following reasons.

[19] It is clear that the assignment agreement and term loan dated 11 March 1997 were frustrated. The fact that the defendants could never get back the units that they have assigned to the plaintiff is the main cause. This state of affairs came about because the developer had sold off the unit to a 3rd party. The fact that the plaintiff's application in Civil Suit No: S3-24-3280-2002 for a declaration that it is the rightful assignee of the property was dismissed had confirmed the fate of the units. They could never be handed over to the defendants. Even if the defendants had paid up the entire loan disbursed to them they will never be able to enjoy the units that they have paid for over the years.

[20] I find that the plaintiff's argument that the defendants would have to keep making payments to the plaintiff regardless of the fact they will never obtain the units somewhat inconceivable. Equally so is the plaintiff's contention that the units are not the consideration for the agreement, but the defendants' agreement to pay. I can see the answer all within the provisions of cl. 50 of the agreement. The clause provides that the defendants shall be entitled to obtain a discharge and release of the said property upon full repayment of the loan to the plaintiff. This shows that what is required of the plaintiff after the loan is repaid in full is to release and discharge the property to the defendants. This is the plaintiff's obligation. It is obvious that at the end of the day, the plaintiff would not be able to fulfill that obligation under cl. 50 of the agreement. The effect of all this is that the whole contract is frustrated as a fundamental term of the contract for the plaintiff to reassign the condominium has become impossible even if the full sum due is paid.

[21] In *Goh Yew Chew & Anor v. Soh Kian Tee*, the court held that the sale by the developer of the units to the 3rd party is a "change of circumstances after the formation of the contract" and it is "physically or commercially impossible to fulfill the contract" because the plaintiff would not be able to release the units to the

defendants upon full repayment of the loan. I therefore hold that the loan agreement cum assignment and the term loan agreement dated 11 March 1997 are frustrated and becomes void under s. 57(2) of the Contracts Act 1950.

[22] On the issue of total failure of consideration, I need look no further than the provisions of cl. 10 of the agreement. It was provided that in consideration of the term loan and the sum of RM480,000 given by the plaintiff to the 1st defendant, the 1st defendant agrees to assign all rights and interests in the units to the plaintiff and the plaintiff agrees to reassign the units to the defendant after the defendant pays in full the term loan. Therefore, the plaintiff's contention that the consideration of the agreement is not the physical units but the defendants' agreement to repay the loan is incorrect. The main purpose of the agreement is obviously to finance the purchase of the units by the defendants. The consideration for the agreement is therefore the assigned units. Since the assigned units are no longer in the plaintiff's possession because of the sale of the units to a 3rd party and the Court Order in S3-24-3280-2002 refusing to declare the plaintiff as lawful assignee of the units, there is clearly a total failure of consideration.

[23] On total failure of consideration, Visu Sinnadurai J in *Hong Leong Leasing Sdn Bhd v. Tan Kim Cheong* said:

> Therefore, once there is total failure of consideration, the financier cannot claim any sum by way of instalments from the hirer. Furthermore, if the hirer had already paid certain sums by way of deposit or as instalments, the financier cannot retain such sum. However, where there has been a total failure of consideration, though the agreement is unenforceable, the parties may seek restitutionary remedies: See Goff and Jones *The Law of Restitution* (2nd Edition).

[24] I cannot agree with the plaintiff's argument that it is still entitled to claim for full repayment since it is exercising its right *in personam*. Based on the authority of *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors*, I hold that the right *in personam* is no longer available to the plaintiff since the plaintiff would not be able to release the units to the defendants and therefore failed to fulfill its obligations under the agreement. Having decided that the loan agreement cum assignment and the term loan is frustrated and that there is total failure of consideration, I dismissed the plaintiff's claim with costs against the 1st and 2nd defendants.

[25] As for the 1st defendant's counterclaim, I considered the fact that the 1st defendant had paid a total RM220,892.53 for the purchase of the units, including RM43,722.53. Just as the plaintiff had claimed that it has released a major portion of the loan, the 1st defendant had similarly made substantial repayment to the plaintiff. It would therefore not be fair to claim that the plaintiff's right to full repayment remains intact whilst there is no possibility of releasing the units to the defendant. I find that the provisions of s. 66 of the Contracts Act are applicable here. Following *Public Finance Berhad v. Ehwan bin Saring*, I allowed a total of RM69,922.53 being RM43,722.53 that the 1st defendant has paid to the plaintiff and RM26,200 after deducting RM150,970 with interest at the rate of 8% from 29 September 2004 until full settlement and costs. As for the 3rd defendant, I hold that he is entitled to costs since the declaration that he has sought for had been decided in this determination under O. 14A of the Rules of the High Court 1980.